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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 396

BERNARD GOLDFINE, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent*

MILDRED PAPERMAN, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

THURMAN ARNOLD
ABE KRASH
1229 19th Street, N. W.
Washington 6, D. C.

HAROLD ROSENWALD
85 Devonshire Street
Boston, Massachusetts

Attorneys for Petitioners

Of Counsel:

ARNOLD, FORTAS & PORTER
1229 19th Street, N. W.
Washington 6, D. C.

BURTON L. WILLIAMS
85 Devonshire Street
Boston, Massachusetts

Dated:

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Petitioners, Bernard Goldfine and Mildred Paperman,[1] pray that a writ of certiorari issue to review

[1] Petitioners were tried together, and pursuant to leave of court a consolidated record and brief was filed in the Court of Appeals. This petition is submitted in behalf of both petitioners.

judgments of the United States Court of Appeals for the First Circuit affirming judgments for criminal contempt by the United States District Court for the District of Massachusetts. Petitioner Goldfine was sentenced by the District Court to three months imprisonment and Petitioner Paperman to ten days imprisonment.

OPINIONS BELOW

The "Findings, Conclusions, and Opinion" of the District Court (Wyzanski, J.) are reported at 169 F. Supp. 93 and are reproduced in Appendix A of this petition. The opinion of the Court of Appeals is not yet reported; it is reprinted as Appendix B of this petition. A petition for rehearing was denied without opinion by the Court of Appeals (R. 626).[2]

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[2] A word about the record and citations to the record in this petition: The record certified to this Court by the Court of Appeals consists of three volumes. Volumes I and III contain the record of the proceedings in the District Court and Court of Appeals following filing of the petitions for criminal contempt. Volume II contains the proceedings prior thereto, commencing with the filing of a petition for enforcement of summonses issued by the Bureau of Internal Revenue. Volume II was the record in the appeal by petitioners from the District Court's order to produce, which was dismissed by the Court of Appeals for lack of jurisdiction: *Bernard Goldfine et al* v. *Fred G. Pastore*, 261 F. 2d 519 (1st Cir. 1958) (see p. 10, *infra*). Leave was granted to petitioners by the court below to incorporate in their appendix in this case the entire record appendix in No. 5439. For the convenience of the Court, we have filed nine copies of each of the three volumes of the record with the Clerk. In the certified record the pages of the three volumes have been renumbered seriatim; the nine sets filed with the Clerk have not been repaginated. The certified record is cited herein as R. ....; the nine copies lodged with the Clerk have been respectively numbered and are cited Vol. I ...., Vol. II ...., Vol. III ....).

JURISDICTION

The judgments of the Court of Appeals (Appendix B hereto; R. 623) were entered on July 24, 1959. A petition for rehearing was denied on August 14, 1959 (R. 626). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(i) 18 U.S.C. §§ 401, 402, 3691

(ii) Internal Revenue Code of 1954, 68A Stat. 854, as amended, 26 U.S.C. §7210

(iii) Internal Revenue Code of 1954, 68A Stat. 873, as amended, 26 U.S.C. §7402

(iv) Internal Revenue Code of 1954, 68A Stat. 901, 26 U.S.C. §7602

(v) Internal Revenue Code of 1954, 68A Stat. 902, as amended, 26 U.S.C. §7604

(vi) U.S. Const., Art. III, Fifth, and Sixth Amendments

The texts of the statutes involved are reproduced in Appendix C.

QUESTIONS PRESENTED

1. Whether a *prima facie* case of criminal contempt, which requires proof beyond a reasonable doubt that petitioners acted wilfully in disobeying an order of the District Court commanding production of a voluminous mass of records within about 48 hours, is established upon a mere showing (i) that petitioners had control over the documents; (ii) the documents were previously in existence; and (iii) petitioners voluntarily produced all but seven records which were delivered a few days later than the date set in the order.

there being no other evidence of intent to defy the court apart from the fact of delay with respect to these seven records?

2. Whether a court order was lawful with respect to the time required for performance, and whether petitioners could be held guilty of criminal contempt for delay in compliance, where such order was served on petitioners on a Saturday morning and required them to deliver to the Internal Revenue Service in Boston, Massachusetts, by noon of the following Monday the books and records of five corporations having a total weight in excess of 1,600 pounds, most of which were located in Boston, Massachusetts, but some of which were located in Concord, New Hampshire, in Montpelier, Vermont, and in Plymouth, Massachusetts?

3. Whether petitioners had, or could have had, a fair trial consistently with due process where the judge, trying them for criminal contempt for wilfully disobeying his own order, admitted on the record that because of his personal experience with the petitioners in different and unrelated litigation he had a previously formed opinion that they fell in a class of persons who are prone to wilful disobedience of court orders?

4. Whether the supervisory power of this Court over criminal contempt proceedings should be invoked to set aside a conviction by a trial judge who was sitting in judgment on the issue of defiance of his own order and who, at the same time (as he admitted on the record), had been involved previously in a nationally publicized dispute between himself and petitioner Goldfine in which the judge had impugned the integrity and veracity of the petitioner and the petitioner had impugned the integrity and veracity of the judge?

5. Where the documents required to be delivered by a court order have been delivered and the only issue is whether petitioners are guilty of criminal contempt with respect to the time, place, and manner of production, may the trial court, in determining whether petitioners are guilty of wilful defiance of its order, disregard representations by counsel in open court that he, rather than petitioners, was responsible for the time, place and manner of compliance?

6. Whether in a prosecution for criminal contempt for wilful disobedience of a court order under Section 401 of Title 18, U.S.C., petitioners were entitled to indictment by a grand jury and trial by a petit jury under Article III and the Fifth and Sixth Amendments to the Constitution where the conduct deemed to constitute a contempt was also punishable as a substantive crime?

STATEMENT OF THE CASE

Introductory

The facts which we deem controlling and which are discussed in detail below are these:

(i) Petitioners were ordered by the District Court to produce within about forty-eight hours, including Saturday and Sunday, a voluminous mass of documents located in four different cities and in the possession of five different corporations.

(ii) Petitioners began to perform the order within the short time set and continued performance with such rapidity that within eight days the order had been complied with and all of the documents, which weighed over 1600 pounds, had been delivered.

(iii) Two days after the time for performance, and while performance was continuously going on, peti-

tioners were charged with criminal contempt and wilful defiance of the court.

(iv) The trial commenced six days after the filing of the petition for contempt. Petitioners were adjudged guilty of criminal contempt for their delay in producing seven records. Prior to the hearing the seven records, on which petitioners' conviction is based, had already been brought to court for the purpose of compliance.

(v) Petitioners' trial counsel informed the District Court that the time and manner of presentation of these seven records in compliance with the order was his own responsibility and not that of petitioners.

(vi) In determining the gravity of the offense the District Judge relied upon a previously formed adverse opinion as to petitioners' character which he had obtained from personal experience with them in two other cases in which he said that Petitioner Goldfine had been on the verge of contempt without actually committing it.

(vii) The District Judge noted that he and petitioner Goldfine had been engaged in a nationally publicized dispute in which, in the view of the District Judge, petitioner had acted improperly and had impugned the veracity of the District Judge.

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1. On December 3, 1958, the Internal Revenue Service filed a Petition for Enforcement of Internal Revenue Summons under Sections 7604 and 7402 of the Internal Revenue Code of 1954 (26 U.S.C.) in the United States District Court for the District of Massachusetts (Vol. II, 6). This petition sought enforcement of six administrative summonses of the Internal

Revenue Service served upon petitioners in July and August, 1958. Four of the summonses were addressed to petitioner Goldfine as Treasurer of Lebanon Woolen Mills Corporation, as Treasurer of Lebandale Mills, Inc., as President of George Mabbett & Sons Company, and as President and Treasurer of Strathmore Woolen Company; and two were addressed to petitioner Paperman as Chief Accounting Officer of Northfield Mills, Inc. (Vol. II, 17-19, 30-38).

The petition for enforcement alleged that on August 1, 1958, some of the books and records covered by the summonses had been made available for examination by Internal Revenue agents at the offices of the corporations; that such examination had been suspended at the request of counsel for the corporations, and exclusive access to the books and records had been granted to the corporations for the period from August 27, 1958 to October 27, 1958, for the preparation of necessary Federal income tax returns; that an extension of such period had been requested by counsel for the corporations on October 24, 1958, and refused by the Regional Commissioner on October 28, 1958; that on October 31, 1958, counsel for the corporations appealed from the refusal of such extension to the Commissioner of Internal Revenue and such appeal was denied by the Commissioner on November 25, 1958; and that on November 5, 1958, *while said appeal was pending*, formal demand for the books and records was made upon petitioners and refused by them (Vol. II, 6 *et seq.*).

2. Upon the filing of the petition for enforcement on December 3, 1958, District Judge Wyzanski entered an order to show cause against petitioners returnable two

days later, at 10:00 a.m., December 5, 1958.[3] (Vol. II, 40-41). This order was served on petitioner Goldfine at 7:55 p.m. December 3, 1958, and on petitioner Paperman at 7:59 a.m. December 4, 1958, at their respective last and usual places of abode (Vol. II, 41). Counsel for petitioners received telephone notice of the hearing at about 4:50 p.m. December 3, 1958 (Vol. II, 44). No answer to the order to show cause was filed by petitioners (Vol. II, 43).

3. Thereafter, on Friday, December 5, 1958, a hearing on the order to show cause was held before Judge Wyzanski (Vol. II, 43 *et seq*). At this hearing counsel for petitioners complained that they had not had sufficient time to prepare the case and requested an opportunity to prepare an answer and file a brief (Vol. II, 44, 50). This request was denied although no objection was interposed by the government. At the conclusion of the hearing Judge Wyzanski entered orally "an effective order, an order from the bench" (Vol. II, 99), which was reduced to writing and designated as an "Interim Order" (Vol. I, 309). The Interim Order was signed at the close of a further hearing held at 4:30 p.m. on the same day (Vol. II, 110).

The petitioners were not personally present at either of the hearings on December 5, 1958. They were in New York City on that date.[4] There is no evidence that either petitioners knew about the order until Saturday, December 6, 1958, when it was served upon them (Vol. I, 9, 17).

[3] The return date was so fixed by the court despite the statement of Government counsel that it was the uniform practice to give ten days notice (Vol. II, 5).

[4] See *Heddendorf v. Goldfine*, 167 F. Supp. 915, 927 (D. Mass. 1958).

The "Interim Order" required petitioners to produce by noon of Monday, December 8, 1958, at the office of the Internal Revenue Service, Boston, Massachusetts, the following books and records of each of the five corporations named above: the minute book, the general ledger, the accounts receivable ledger, the accounts payable ledger, the general journal, the cash receipts book, the cash disbursement book, the voucher register, the purchase book, the sales book, the duplicate deposit books, the cancelled checks, the check book stubs, and the supporting vouchers. Such books and records were to cover the following periods respectively: for Lebanon, the six calendar years 1952 through 1957; for Lebandale, the two fiscal years ended June 30 in 1956 and 1957; for Mabbett, the three fiscal years ended September 30 in 1955 through 1957; for Strathmore, the five calendar years 1953 through 1957; and for Northfield, the five fiscal years ended April 30 in 1953 through 1957 (Vol. II, 309-311).

While most of the required books and records were located in Boston, some were in Concord, New Hampshire, some in Montpelier, Vermont, and some in Plymouth, Massachusetts (Vol. I, 184, 328, 86). Furthermore, many of the documents were scattered through the files of the various corporations and had to be collected (Vol. I, 85, 90-91, 96). The aggregate weight of the books and records covered by the order exceeded 1613 pounds (Vol. I, 121-124).

4. On the same day on which the Interim Order was issued, Friday, December 5, 1958, petitioners filed a notice of appeal to the Court of Appeals from the Interim Order (Vol. II, 2, 102-103). At 4:30 p.m., the same day the order was issued, Judge Wyzanski denied a stay.

Petitioners appealed from the Interim Order to the Court of Appeals. That court stayed the order for only three hours, until 3:00 p.m., Monday, December 8, 1958 (Vol. I, 312). A further stay was denied on the ground that the Interim Order lacked finality (*Goldfine* v. *Pastore*, 261 F. 2d 519 (1st Cir. 1958)); and subsequently the appeal was dismissed for lack of jurisdiction (App. B, 16a).

5. On Monday, December 8, 1958, shortly after the stay expired at 3:00 p.m., petitioners began to deliver documents to the Internal Revenue Service in compliance with the Interim Order. A large number of books and records were collected and sent to the Internal Revenue office at that time, within about forty-eight hours after service of the order on Saturday, December 6, 1958 (Vol. I, 313-315, 317-318). Receipt of these records was duly acknowledged by the Internal Revenue Service (*Ibid*). From December 8 until December 18, 1958, when the contempt trial was concluded, continuous deliveries of these documents were made. During these ten days the record shows twenty receipts for such deliveries, or an average of two deliveries a day (Vol. I, 313-333). Up to December 17, 1958, 1613 pounds of documents had been delivered (Vol. I, 121-124).

6. Two days after this continuous stream of deliveries had commenced on Monday, December 8, and in the midst of production, at 3:00 p.m. on Wednesday, December 10, 1958, the United States Attorney filed Petitions for Attachment for Criminal Contempt alleging wilful disobedience of the Interim Order in violation of 18 U.S.C. §401. Petitioner Goldfine was charged in three counts, the first count charging him with

"wilfully failing and refusing to produce the books and records" of Lebanon, and the second and third counts charging similar offenses in respect of Lebandale and Mabbett respectively (Vol. I, 7 *et seq.*). Petitioner Paperman was charged in two counts with "wilfully failing and refusing to produce the books and records" of Strathmore and Northfield respectively. At the same time, the Government moved that petitioners be adjudged in civil contempt (Vol. I, 7).

The District Court set the case for trial six days later, on December 16, 1958, and directed that the criminal and civil contempt petitions should be tried simultaneously (Vol. I, 7).

7. Early in the contempt trial, the District Judge announced that he would not hold the petitioners guilty of contempt in respect of documents delivered at any time prior to the beginning of the contempt trial. As he put it (Vol. I, 77):

> "It would be most unlikely that I would punish for criminal contempt a failure to deliver on the 8th *if a delivery had taken place by now* [i.e., December 16]. What I am really interested in is, *what items called for have not yet been delivered.*" (emphasis supplied)[5]

The District Judge found that "there has been an enormous turnover of documents to the custody of the Internal Revenue [Service]" and that "indisputably * * * there has been a compliance of large magnitude"

[5] Before the District Judge made this comment, the seven records on which the contempt conviction was predicated, had already been brought into the courtroom; they were delivered there on the morning the trial commenced for the purpose of compliance (p. 15 *infra*).

(Vol. I, 31). The District Judge, however, held petitioners guilty of criminal contempt because of their delay in producing seven records, namely the accounts receivable and accounts payable ledgers of three of the five corporations, and a few cancelled checks of one of the corporations (Vol. I, 244-245). The District Judge predicated his finding of wilfulness on the mere facts that petitioners knew of the existence of the seven records and failed to produce them in time (Finding 32, Vol. I, 251). Petitioners produced the seven records but had not done so on the date the contempt charge was filed. He ruled that: "Failure to produce promptly such a known and readily reached record is wilful defiance" (Vol. I, 252).

Goldfine was found guilty on Count 1 of the petition for attachment for criminal contempt; he was found not guilty on Counts 2 and 3. Miss Paperman was found guilty on both counts. Goldfine was sentenced to three months imprisonment and Miss Paperman to ten days imprisonment. Motions by petitioners for a judgment of acquittal or alternatively for a new trial, and for reduction of sentence were denied (Vol. I, 277-283, 303). The District Court found that petitioners were not liable for civil contempt (Vol. I, 271).

8. The seven records upon which the convictions were predicated were produced in court by the petitioners themselves at the contempt trial; they were offered in evidence on the second day of the trial during the course of cross-examination of Internal Revenue agents; and they were delivered to the Internal Revenue Service the same day (See Finding 20, Vol. I, 249; Finding 31, Vol. I, 251). At the conclusion of the hearing it was apparent from the record that there had

been full compliance with the Interim Order except for the delay in producing the seven records. The District Judge in effect so recognized by dismissing the motions for civil contempt.

There was no evidence that the seven records were unique or of special importance as compared to the large number of documents previously produced by the petitioners. There was no evidence that the Internal Revenue Service assigned a higher priority to these seven documents than to others, or that time was of the essence with respect to production of these seven records. There was no evidence that the records contained incriminating data (compare *Nilva* v. *United States*, 352 U.S. 385).

The record shows that the seven records were produced in open court on the advice of petitioners' counsel and with the intent of complying with the Interim Order. As petitioners' trial counsel stated in presenting one of the seven records (Vol. I, 156):

> "The book which has been admitted in evidence *is offered by me as belated performance*, to be sure *but performance of the interim order*" (See also Vol. I, 158). (emphasis supplied)[6]

Petitioners' trial counsel informed the court that he had determined that production of these records should be made in this manner because there was a "problem"

[6] The Court of Appeals mistakenly found (App. B, 19a) that "When these documents were produced in court on December 18, it was for the avowed purpose of demonstrating to the court that they were current records in use by the corporations and that compliance with the interim order would make it impossible for the corporations to conduct their business." There is no evidence in the record to support this finding.

involving these records which he wished "to present to the Court a little later" (Vol. I, 154). He subsequently explained that he had produced them in open court because the documents contained irrelevant matter outside the scope of the Interim Order, and he desired to elicit a suggestion from the court with respect to the appropriate method of compliance in these circumstances (see Vol. I, 156-157, 202-204). The District Judge refused to offer any suggestion for compliance, stating that "There is no method of offering to the Court anything in compliance with the interim order" (Vol. I, 156).

Petitioners' trial counsel repeatedly advised the court that the time, place, and manner of production of the seven records had been determined by him. Petitioners, he said, relied "on the advice of counsel" (Vol. I, 203). He further said, "'[W]hat I am suggesting to your Honor is, that in the circumstances that appear here, with counsel wrongly bringing something to Post Office Square [i.e., to the Court] that should have been brought to 55 Tremont Street, [the Internal Revenue Service Boston office]—that there is no evidence of wilfulness or, if you like, in the alternative, the finding of wilfulness is against the weight of the evidence." (Vol. I, 289.)

The Government did not interpose any objection to trial counsel's representations. It did not offer any contradictory evidence, and no suggestion was made in oral argument that these statements were not true. The District Court, however, refused to assign any weight to the representations that petitioners had acted upon the advice of counsel on the ground that there was no sworn testimony to that effect. It dismissed the representations as an "argumentative thrust" (Vol. I, 250).

After the opinion had been filed by the Court of Appeals affirming the convictions, petitioners sought leave to file with the Court of Appeals an affidavit of trial counsel, an eminent member of the Boston bar, in support of a petition for rehearing (R. 624). Trial counsel stated in the affidavit that, on the day before the contempt trial, a question had arisen concerning the method of compliance with respect to six of the seven records because they "contained irrelevant material not called for by the Interim Order", that "I decided to bring the documents to court in order to obtain a suggestion from the court how to eliminate the irrelevant matters", and that the "documents were in fact brought to court at about 9:35 a.m. on December 16", the morning on which the contempt trial commenced (R. 625).

The fact that the six records were actually brought to court on the first morning of the trial was not called to the attention of the trial court. If the District Court had adhered to its view that petitioners would not be guilty of contempt if documents were produced before the trial, p. 11 *supra*, petitioners presumably would have been found not guilty. The prayer by petitioners in their petition for rehearing in the Court of Appeals that the case be remanded for findings on this issue was denied by the Court of Appeals.

REASONS FOR GRANTING THE WRIT

Importance of the Issues

This petition raises fundamental questions respecting the exercise of the criminal contempt power by the federal courts. The questions relate (i) to the burden of proof which the prosecution must discharge before punishment can be imposed for delay in complying with

an order requiring the production of an enormous quantity of documents in a very short time; (ii) to the permissible scope and conditions of an order to produce books and records on pain of criminal contempt; (iii) to the principle that a judge presiding in a criminal contempt proceeding should not rely, in weighing the gravity of petitioners' alleged defiance of his order, upon personal experience with petitioners in different and unrelated proceedings from which the judge derived an unfavorable impression of their attitudes toward him; (iv) to the principle that a judge who has been embroiled in an acrimonious public controversy with the accused should not sit in judgment in a case involving a charge that the accused has defied his orders; (v) and to the far-reaching constitutional issue of the right of a party charged with criminal contempt to indictment by a grand jury and trial by a petit jury where the underlying conduct deemed to constitute contempt is also punishable as a substantive crime.

The Court of Appeals has decided issues of major importance in the administration of the contempt power. Because of the very nature of contempt proceedings, the supervisory powers of this Court over the fair administration of criminal justice in the federal courts are frequently exercised to prevent abuse of this power. This Court has emphasized that "the district courts have a special duty to exercise such an extraordinary power [as the criminal contempt power] with the utmost sense of responsibility and circumspection" and that "appellate courts have here a special responsibility for determining that the power is not abused." *Green* v. *United States*, 356 U.S. 165, 188.

Because the customary procedure in trials for criminal contempt is anomalous in our system of trial

by jury, the avenues to review by this Court must be kept open, even in cases where criminal convictions following trial by jury would not be reviewed. The current prevalence of Congressional investigations has been the occasion for invoking the aid of this Court in supervising the use of contempt powers to compel a response to legislative inquiries. The growth of administrative agencies has been accompanied by an increasing resort to the federal courts to enforce administrative subpoenas with the sanctions of criminal contempt. Dangers of the arbitrary use of these powers are constantly present and can only be avoided by the vigilant supervision of this Court.

Thus it is a matter of importance to every custodian of corporate records for this Court to determine whether a Federal District Court may punish for criminal contempt because of a slight delay in obeying its order to produce corporate records, entered at the behest of the Internal Revenue Service, which has the broad scope and brief time for compliance of the present order. Equally important is the issue whether a *prima facie* case of wilful violation of such an order is proved merely by showing that persons having control of all existing documents covered by the order had produced out of time a few of the numerous books and records covered by the order without any other evidence of wilfulness. Conviction for criminal contempt for violation of a court order by the judge who entered the order where, as here, the trial judge has been personally so involved with the alleged contemnor to such an extent that strict impartiality on his part is subject to doubt, casts a shadow upon the integrity of our judicial system. Finally, where the underlying conduct constitutes a violation of a fed-

eral penal statute with a right to trial by jury, there is a serious and substantial issue whether that right can be denied by resort to the contempt power.

The Issues Presented

I

The Government's Burden of Proof on the Issue of Wilfulness

The Court of Appeals held in substance that a *prima facie* case of criminal contempt is established upon a mere showing that petitioners, who had control of documents, delivered them at a date later than the date fixed by a court order directing production. We submit that this ruling offends the presumption of innocence and relieves the prosecution from the burden of proving beyond a reasonable doubt that the accused intended to defy the court.

The Court of Appeals stated (App. B, 18a-19a):

> "It is enough to make out a prima facie case for the government to show, as the government did below, that the appellants, in response to the interim court order calling for the production of corporation records, refused to surrender them when they were in existence and within their control. See *Nilva* v. *United States*, 352 U.S. 385, 392 (1957)."

This is, indeed, the rule stated in the *Nilva* case. But it has no application to the present case. There was no evidence in the present case that petitioners "refused" to deliver the documents in question. There was no proof that petitioners were adamant or defiant. To the contrary, all of the records required to be produced by

the Interim Order were offered in court in response to the order and were in fact delivered to the Internal Revenue Service.

The District Court found petitioners guilty of contempt not because of "refusal" to comply but solely because of their delay in turning over seven records. These records, as we have pointed out, were in the courtroom prior to the commencement of the trial, and they were turned over to the Internal Revenue Service on the second day of the trial, p. 15, *supra*. There was no proof that the seven records were unique or that they were in any respect more significant than the voluminous records previously turned over by the petitioners.

Thus a critical question is presented as to the quantum of proof necessary to establish a *prima facie* case of criminal contempt with respect to a court order to produce corporate records. Surely, in the present case, mere proof that the documents were in existence and within the control of petitioners and that there was a delay in delivery does not establish a wilful failure or refusal to deliver them, especially in the light of the scope of the Interim Order and the brief time allowed for compliance. Nor does such proof properly amount to a *prima facie* case so as to compel petitioners to prove lack of wilfulness. In order to prove the element of wilfulness it was incumbent upon the Government to present convincing evidence that petitioners made a "deliberate and intentional" decision not to obey the court's command. *Flaxer* v. *United States*, 358 U.S. 147, 151.[7]

[7] The necessity of proving wilfulness was emphasized in *In re Wegman*, 40 App. Div. 632, 57 N. Y. Supp. 987 (1899), involving

Mere proof of delay does not constitute proof of wilful disobedience. Where an order to produce is complied with, the proof that the compliance is late does not even create an inference of defiance of the court unless special aggravating circumstances are shown. A delay of eight days in producing seven documents (not shown to be of particular importance) out of a total of approximately 1600 pounds of material which petitioners had been continuously supplying does not support even an inference that the purpose of the delay must have been to defy the court. The District Judge found that "indisputably * * * there has been a compliance of large magnitude" (Vol. I, 31).

We need not speculate as to the kind of evidence that might be produced to prove wilfulness. It was the burden of the Government to produce such evidence, however difficult its task might be. Cf. *Maggio* v. *Zeitz*, 333 U.S. 56, 64 (1948). It may not require petitioners to establish their innocence where the prosecution has failed to produce evidence, direct or circumstantial, that petitioners intended to defy the court. Such a "drastic shifting of the burden of proof in a criminal case" should not be countenanced by this Court. See *United States* v. *Patterson*, 219 F. 2d 659, 661 (2nd Cir. 1955).

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facts similar to the present case except that in that case there was no proof of control of the book in question. The Court stated:

> "Before he could be deprived of his liberty, the fact that he had *willfully* disobeyed the order of the court must be clearly established. The fact could not be left to inference or conjecture. The proof must show beyond a reasonable doubt that he had *willfully* refused to do what the court directed." (40 App. Div. at 633) (emphasis supplied)

If the rule of law, applied by the trial court and affirmed by the Court of Appeals, that delay itself is *ipso facto* contumacious, is sustained here, the doctrine that "In criminal contempts, as in criminal cases, the presumption of innocence obtains", and that "proof of guilt must be beyond reasonable doubt and the defendant may not be compelled to be a witness against himself" (*Michaelson* v. *United States ex rel Chicago, St. P., M. & O. Ry Co.*, 266 U.S. 42, 66) will be subverted. See also *Flaxer* v. *United States*, 358 U.S. 147, 151. Not only would the prosecution be relieved from its traditional responsibility, but the petitioner would be forced to forego his basic right to remain silent. The far-reaching consequences of this harsh test of wilfulness are appropriate for consideration by this Court in the exercise of its supervisory powers.

II

Illegality of the Interim Order

Petitioners could be pronounced guilty of contempt only if the "Interim Order" were a "lawful * * * order" within the meaning of 18 U.S.C. § 401.[8] We submit that in light of the tremendous quantity of documents called for the provision in the Interim Order respecting time for compliance was unreasonable, that the Interim Order was therefore unlawful, and that petitioners accordingly cannot be punished for contempt because of a short delay in compliance.

The record shows that petitioners were given about 48 hours, including Sunday and part of Saturday, for

[8] See *Green* v. *United States*, 356 U.S. 165, 169: "[T]he order here issued was beyond dispute 'lawful' * * *".

delivery of the great mass of documents required by the order. The Interim Order was first entered orally as "an effective order, an order from the bench" at the conclusion of a hearing which presumably commenced at 10 A.M., Friday, December 5, 1958 (Vol. II, 41, 99). The written order was signed at a hearing that commenced at 4:30 P.M., later the same day (Vol. II, 103, 110). There is no evidence that either of the petitioners knew of the order prior to Saturday, December 6, 1958, when it was served upon them (Vol. II, 2, Vol. II, 112). The time allowed for compliance must be reckoned from that date. Compliance with the court order was commanded by its terms by noon on Monday, December 8, 1958 (Vol. I, 309-311). This time was extended by the Court of Appeals until 3 P.M. of the same day (Vol. I, 312).

The record does not show that there was any necessity whatever for such haste. The government did not request hurried delivery; indeed, government counsel told the District Judge when the petition for enforcement was filed that it was "uniform practice" to allow respondents ten days to answer an order to show cause. (Vol. II, 5). The question this presented is whether a district court can require production of the vast mass of records involved here within the brief time allowed, without some showing that speed is essential, and then convict parties of criminal contempt for delay in compliance. Unless some limits are placed upon the judicial subpoena power, any person under investigation by a federal administrative agency can be subjected to a court order "which creates a duty impossible of performance, so that punishment can follow". *Maggio* v. *Zeitz*, 333 U.S. 56, 64.

This issue was bypassed by the courts below. In substance, both of the lower courts regarded the case

as if the Interim Order merely required the production of seven records. During the trial the District Court repeatedly disclaimed any interest in the amount of documents already delivered (Vol. I, 63-64, 69, 189-190). But if it was impossible in the present case to produce all of the records in time, as we contend, petitioners would inevitably have produced some of them late. And the last documents produced, under the rulings of the courts below, would serve as the basis of a conviction for contempt.

III

Fairness of Trial by Judge Wyzanski—His Unfavorable Opinions Concerning Petitioners Derived from Prior Unrelated Cases

A substantial question meriting review by this Court arises from the fact that the District Judge, in determining the gravity of the offense, relied upon unfavorable impressions of petitioners derived by him from unrelated cases. Judge Wyzanski, who entered the Interim Order to produce and presided over the contempt trial, had had previous judicial experience with petitioners. At the sentencing, Judge Wyzanski stated to Petitioner Goldfine:

> "In a case before me a company in which you are interested was fined $20,000 for a contempt and you yourself were charged with the contempt, although for reasons which satisfied me at the time I thought you personally ought not to be fined." (Vol. I, 263).

At the same time, the trial judge referred to Petitioner Goldfine's experience with the problem of contempt before a Congressional Committee (Vol. I, 264).

He then referred to an incident in another case, *Heddendorf* v. *Goldfine*, 167 F. Supp. 915 (D. Mass. 1958), in which he had sat, as follows:

> "But here we have a case where in the most explicit terms, on the very day when you chose not to fulfill your commitment in an earlier case, I warned you that if you did not comply with the order of this Court you would suffer the penalties of criminal and civil contempt, if they were applicable." (Vol. I, 264).

Judge Wyzanski concluded:

> "*You thus fall into a class of persons experienced with this type of procedure, on the verge, if not over the verge, of defiance on a number of previous occasions.*" (Vol. I, 264) (emphasis supplied).

With respect to Petitioner Paperman, Judge Wyzanski stated, when imposing sentence on her:

> "But your association with all the previous litigation to which I have referred has been so intimate that I must say you, also, are both a woman of experience and deliberate defiance." (R. 266).

These expressed opinions of Judge Wyzanski, amounting to nothing less than a conviction that petitioners fall into a class of persons who are prone to wilful disobedience of court orders, raise the important question whether a judge having such opinions can fairly try a case involving criminal contempt charges for alleged wilful disobedience of his own order. We submit that this Court should determine whether a trial in such circumstances is repugnant to the basic requirements of due process.

Trial for criminal contempt for alleged disobedience of a court order by the judge who entered the order has been a matter of concern to this Court. True it is that such trials were sanctioned in *Green* v. *United States*, 356 U.S. 165, and *Nilva* v. *United States*, 352 U.S. 385. But each of these cases was a "dubious pronouncement of a gravely divided Court . . ." (*Cooper* v. *Aaron*, 358 U.S. 1, 27, concurring opinion of Mr. Justice Frankfurter), and in both cases vigorous dissents were written. This Court should not sanction a trial by the judge who entered the order and who had a preconceived adverse opinion concerning the character of the alleged contemnors.[9]

The Court of Appeals disposed of the contention that Judge Wyzanski should not have acted in this case principally on two grounds: first, that petitioners knew of the prior litigations before to the contempt trial and did not move to disqualify Judge Wyzanski; and, second, that the only evidence of Judge Wyzanski's opinions concerning petitioners was his remarks at their sentencing and that such remarks, "read in context, cannot serve as the basis for any charge of prejudice." (App. B, 22a)

Since the opinions of Judge Wyzanski were expressed at the sentencing, they could not have served as a basis for disqualification at, or prior to, the trial. Under such circumstances the issue was properly raised for the first time in the Court of Appeals. *Knapp* v.

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[9] Serious doubts have been expressed even as to the propriety of punishment by a judge for contempt committed in his presence where the record indicated that he was not impartial to the accused. *Sacher* v. *United States*, 343 U.S. 1, 14, 23, 89 (dissenting opinions of Justices Frankfurter, Black, and Douglas).

Kinsey, 235 F. 2d 129, 131 (6th Cir. 1956), *cert.* denied, 352 U.S. 892.

Moreover, we are not dealing with the question of disqualification of a judge in an ordinary case. Here, the trial judge was adjudicating issues of the reasonableness of his own order and the wilfulness of petitioners in alleged disobedience of that order. A fair trial of such issues is jeopardized by much less substantial factors than would be required to support a claim of prejudice in other cases.

Finally, the suggestion that the remarks of Judge Wyzanski at the sentencing are harmless when read in their context is unjustified. The opinion that petitioners fall into a class of persons who are prone to wilful disobedience of court orders, carried over from litigation prior to the contempt trial, was obviously in the mind of the judge during the trial as well as at the sentencing. The District Judge thus approached the critical issue of intent in a criminal case with a presumption against petitioners.

If a trial judge can dispose "of matters before him in reliance upon his personal recollection of what transpired in the trial of a cause before him" (*Ladner v. United States*, 230 F. 2d 726, 727 (5th Cir. 1956), rev'd on other grounds, 358 U.S. 169) there is serious danger that the defendant will be deprived of an effective opportunity to show on the record that the judge's appraisal was erroneous. In the present case, the two instances to which the trial judge referred as indicating that petitioners were prone to disobedience, might well appear in an entirely different light to another judge, particularly if the petitioner had an opportunity to

offer evidence in support of his version. We have briefly summarized the pertinent facts in the margin, and we respectfully submit that they indicate there was no basis for the trial judge's assertion.[10]

[10] (a) The trial judge asserted (Vol. I, 264) that Goldfine had "chos[n] not to fulfill * * * [his] commitment in an earlier case," namely *Heddendorf* v. *Goldfine*, 167 F. Supp. 915 (D. Mass. 1958). A proposal for settlement of a derivative stockholder's suit had been presented to the District Court for its approval under Rule 23(c), F.R.C.P. (167 F. Supp. at 917). No one opposed the settlement; all the parties and others approved it (167 F. Supp. at 927). Judge Wyzanski nevertheless withheld his approval of the settlement until Goldfine filed a sworn statement respecting the purchase of cashier's checks by one or both of the corporations involved (*Id.* at 925-926). The court recognized that its only sanction if Goldfine chose not to file the affidavit was the withholding of its approval of the compromise (*Id.* at 926). Goldfine's counsel "had made a representation or something close thereto" that Goldfine was "fogbound in New York [and] it would be difficult to get the draft approved in final form and executed by Goldfine on that day" (167 F. Supp. at 927). Goldfine, however, never committed himself to signing the statement (see *Id.* at 927). Goldfine chose not to sign the statement, and thereby, to incur the risk that the statement would not be approved (*Ibid.*). In short, he exercised a legal privilege, and in no way repudiated any "commitment" by him to the court. Subsequently, the District Court approved the settlement as "fair" and "generous," even though Goldfine did not execute the affidavit (167 F. Supp. at 928).

(b) In the second situation to which the court alluded, a $20,000 fine for criminal contempt had been imposed against a corporation, but Judge Wyzanski himself exonerated Goldfine because "there was no absolute showing that Mr. Goldfine personally was a person so in charge of the records as to be held accountable for failure to produce them." (Vol. I, 291-292.)

IV

Fairness of Trial by Judge Wyzanski—His Personal Public Dispute with Petitioner Goldfine

The District Judge and Petitioner Goldfine had been embroiled several months before the contempt trial in a public dispute. The controversy received nationwide publicity. Goldfine was questioned about the matter before a congressional committee. The Special Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce. We have set out the relevant excerpts from the transcript of testimony before the Committee as Exhibit 1, attached to this petition.

The publicized facts concerning the controversy were these: In November, 1957, Goldfine and his wife had received an invitation to a charity benefit in Boston. The invitation to Goldfine was signed by Judge Wyzanski's wife, who was chairman of the fund raising event. Goldfine attended the benefit and pledged a contribution of $1,000. According to a newspaper account, "After the words 'secured by' on the [pledge] card, Mr. Goldfine had written the name of the judge's wife. Mrs. Wyzanski was the chairman of the fund-raising event at which the pledge was made. * * * The next day [i.e., the day following the benefit] Mr. Goldfine called our office [i.e., the American-Israel Culture Foundation] to correct the impression created by filling in Mrs. Wyzanski's name. He said that he didn't quite know what to put down and, seeing her listed as chairman, wrote in her name. He explained that the gift was not given in her honor." *The New York Times*, June 19, 1958, p. 22, col. 6.

A derivative stockholder's suit in which Goldfine was defendant was pending at the time before Judge Wyzanski. *Heddendorf v. Goldfine*, 167 F. Supp. 915 (D. Mass. 1958). Immediately following the incident at the benefit, Judge Wyzanski issued "an unusual personal comment from the bench" (Exhibit 1, p. 2) in which he stated as follows:

> "The COURT. A, to me, entirely unprecedented and rather disagreeable incident happened in connection with this case, and I feel bound to state it. I have already made a full disclosure of this matter to the Chief Judge and other Judges of this Circuit.
>
> So far as I know, previous to Sunday I have never seen Mr. Bernard Goldfine. So far as she knows, my wife had never previously seen Mr. Goldfine.
>
> A charity with which my wife is connected and with which I have no connection, not even as a donor, was having a benefit on Sunday evening. Mr. Goldfine, in Mrs. Wyzanski's presence and mine, made a gift to that charity which he asked the recipient of the gift — that is to say, the solicitor who received the subscription — to say he was making it in honor of Mrs. Wyzanski.
>
> I am not clear whether Mr. Goldfine appreciated the full significance of what he was doing, and I do not know whether he had it in the back of his mind that one of the effects of such action might be to make me consider whether I should disqualify myself in the case. Whatever may have been his object, I have stated the facts, and I am sitting on the case." (Transcript of proceedings, *Heddendorf v. Goldfine*, C.A. No. 56-356, (D. Mass.), November 27, 1957).

In July 1958, during congressional committee hearings, Goldfine was interrogated *inter alia* concerning the circumstances of this charitable contribution. Goldfine denied that the contribution was "given in honor of Mrs. Wyzanski" (Ex. 1, p. 4). An excerpt from the foregoing statement by Judge Wyzanski was read to Goldfine, and he was asked, "Did Judge Wyzanski make that statement?" Goldfine answered: "He probably did, but we knew the facts. It was a horse of another color * * * The judge didn't know that Mrs. Wyzanski had given us a personal invitation." (Exhibit 1, p. 5).

In sentencing Goldfine for contempt in the present case, Judge Wyzanski stated with reference to Goldfine's testimony before the Congressional committee (Vol. I, 294):

> "I closed my eyes to a statement he made flatly contradicting this Court's remark of somewhat over a year ago as to the circumstances under which a certain gift was made—a statement he made flatly contradicting as false the statement this Court made. I ignored it, and I do ignore it."

This case thus presents the extraordinary spectacle of a judge sitting in judgment over a party with whom he has been previously involved in an acrimonious and nationally publicized dispute. As the foregoing remarks indicate, Judge Wyzanski felt that Goldfine had impugned his veracity in his testimony before the House Committee. The merits of this controversy are, of course, beside the point. But there can be no dispute that the trial judge was personally deeply enmeshed in this incident. Whatever the merits, Judge Wyzanski must have sincerely felt a sense of righteous indignation at petitioner Goldfine, who, he believed, had accused him before a nationwide audience of making false

statements in a matter which was receiving front-page headlines over the entire country. In these circumstances, we respectfully submit that Judge Wyzanski should not have presided in the present case, and that the supervisory powers of this Court should be exercised to set aside his judgment. See *Sacher* v. *United States*, 343 U.S. 1 (dissenting opinions by Justices Frankfurter, Black and Douglas). It is important, as Lord Chief Justice Goddard observed, that "justice must not only be done but must manifestly be seen to be done" (*Rex* v. *Bodmin JJ.* [1947] 1 K.B. 321, 325). Certainly a conviction by a judge who is indignant against a party on account of a personal grievance does not have the appearance of justice.

The Court of Appeals noted that petitioners did not file a motion asking Judge Wyzanski to disqualify himself. The question arises therefore whether, in the absence of an affidavit of personal bias, Judge Wyzanski was entitled to sit when he himself stated upon the record that petitioner Goldfine had accused him of making false statements. We submit that where a judge has a personal grievance of such magnitude it becomes his duty *sua sponte* to excuse himself rather than to put the burden on the defendant and his counsel of adding insult to injury by moving to disqualify the judge because of bias. No attorney who practices before a judge likes to file an affidavit that the judge cannot impartially decide a case where he knows the judge is of a contrary opinion, as Judge Wyzanski was in this case. Judge Wyzanski himself would have been required to pass on a motion to disqualify, and it is clear, from his remarks in this case, that he felt he was not biased (see Vol. I, 302), so that the motion would in any event have been futile. Particularly in a case involving a charge that a defendant has defied his order, the judge should

recognize himself that whether or not he thinks he can disregard his grievance, it will not give the appearance of justice if he sits.

V

Trial Counsel's Representations That He Determined the Time, Place and Manner of Production Should Have Been Considered

It is incontrovertible that the time, place, and manner of production of the seven records was determined by petitioners' trial counsel. Petitioners produced the documents in open court in reliance upon counsel's advice. The Court of Appeals recognized that delay in production "due to the advice of counsel * * * might negate wilfulness" (App. B, 19a), but it held that there was no testimony under oath to this effect. The courts below refused for this reason to assign any significance to trial counsel's representations.[11]

We submit that the courts below erred in refusing to give appropriate weight to these representations, and that, at the very least, the statements created a reasonable doubt that petitioners intended to defy the court.

The prosecution did not object to the representations. It did not request an opportunity to cross-examine counsel. In the absence of objection, the general practice is that counsel's statement concerning his own conduct of a case is accepted by the court without requiring him to assume the inconsistent position of a witness in the very case which he is trying. The trial judge in this case elicited representations of

[11] The District Judge did not indicate any disbelief in trial counsel's statements. Indeed, the trial judge indicated that he had a "very high regard" for defense counsel (Vol. I, 298).

counsel as to material facts and he made rulings on the faith of these representations (see e.g., Vol. II, 52-53, 109). It is obvious that it would be impossible effectively to administer justice if the courts could not rely with confidence upon representations by counsel. Statements by trial counsel in the conduct of a trial differ from statements of ordinary witnesses. Counsel is an officer of the court. Even when not under oath, he is bound not to make misrepresentations to the court. The court can hold him in contempt if his statements are not true. And, as the trial judge noted in this case in pressing for an answer to an inquiry by him (Vol. II, 109): "You are here as counsel. Look. You don't evade questions as counsel any more than you do as witness. Answer it."

Trial counsel here assumed full responsibility for the manner in which the seven records were produced. And it was logical that he should do so, for the matter involved technical procedural considerations. A statement which counsel sincerely believes exculpates his client from having wilfully disobeyed a court's order and which puts the responsibility on himself for an error certainly cannot be ignored on the ground that counsel did not volunteer to take the stand in a case in which he was trying.

But even under strict rules of evidence, the statement of trial counsel that it was his fault that the records were produced as they were should have been considered. There was no objection, and in the absence of objection there is a duty to consider and to give probative effect even to hearsay. *Diaz v. United States*, 223 U.S. 442; *United States v. Fleming*, 134 F. 2d 776, 778 (2nd Cir. 1943). Moreover, the representation of counsel was not objectionable since it was an admission against the interest of the maker, i.e., it was a con-

fession that counsel may have been mistaken in advising his client.

We recognize that it might not constitute a defense to a contempt charge if on advice of counsel documents were not delivered. Such a situation would involve deliberate refusal, and the person in possession of the documents would take a calculated risk. But where a defendant decides to comply, he cannot be said wilfully to defy the court if his counsel erroneously arranges for the details of compliance. A defendant cannot possibly know in that situation that his counsel's advice is erroneous.

The complexity of orders to produce in proceedings of this kind is so great that a rule of law equating counsel's advice on the technical manner of compliance with complete refusal would endanger every defendant who left the responsibility on counsel as to the time, manner and place of production. This question arises in countless cases. It is well known that defendants in obeying a complex subpoena rely on counsel as to technical details. It would spread endless confusion if counsel had to tell a defendant that he was not entitled to rely on counsel's advice on technical details which defendant does not understand.

VI

Petitioners Were Entitled to Indictment by Grand Jury and Trial by Petit Jury

The petitions for enforcement of the Internal Revenue summonses, which resulted in the entry of the Interim Order to produce, alleged that petitioners had refused to obey those summonses (Vol. II, 6 *et seq.*; see 26 U.S.C., §§ 7402, 7604). Failure to obey such a summons is a criminal offense, punishable by fine and

imprisonment (26 U.S.C. 7210). "[P]resumably a conviction of this offense could only be had upon a regular criminal prosecution, with the right of trial by jury." *Brody* v. *United States*, 243 F. 2d 378, 381 (1st Cir. 1957).

Instead of directly prosecuting petitioners under 26 U.S.C. §7210 for failure to comply with an administrative summons, the Internal Revenue Service procured a court order directing production of the records, and it then instituted contempt proceedings for violation of the order. The contempt power was thus invoked to punish conduct declared by statute to be a criminal offense. By this stratagem, the government sought to circumvent a jury trial. To be sure, petitioners were convicted for disobedience of a judicial order, and not for non-compliance with an administrative summons. But the form of the proceeding below should not be permitted to obscure the fact that the substance of the alleged contempt was the same as the conduct proscribed by 26 U.S.C. §7210, namely, failure to turn over requested records to the Internal Revenue Service.

The Internal Revenue Service was not content with invoking the civil contempt power of the District Court under 26 U.S.C. §§7402 and 7604 (Appendix C, attached hereto) to compel production of the books and records; the I.R.S. also invoked the criminal contempt power for the purpose of punishing petitioners. Section 7604(b) vests jurisdiction in the District Court "to enforce obedience to the requirements of the [Internal Revenue] summons and to punish such person for his default or disobedience." To construe this provision as giving the court power to "punish" without a jury trial would raise grave doubts as to its constitutionality.

Article III of the Constitution commands that "The trial of *all* crimes, except in cases of impeachment, shall be by jury", and the Sixth Amendment likewise guarantees that "In *all* criminal prosecutions, the accused shall enjoy the right to a * * * trial, by an impartial jury" (emphasis supplied). We submit that the criminal contempt proceedings in the District Court deprived petitioners of their constitutional right to trial by jury under Article III and the Sixth Amendment, and to indictment by a grand jury under the Fifth Amendment, for the reasons stated by Mr. Justice Black dissenting in *Green* v. *United States*, 356 U.S. 165, 193 (Warren, C. J., and Douglas, J., concurring).

This Court has not yet decided whether there is a right to grand jury indictment and trial by jury in a criminal contempt proceeding under 18 U.S.C. §401(3) where the underlying conduct constituting the alleged contempt is also in violation of a criminal statute. That question was not resolved in *Green* v. *United States*, *supra*. The contumacious conduct in that case, bail jumping, was not then a criminal offense, and this court explicitly noted that "considerations in past decisions limiting the scope of the contempt power where the conduct deemed to constitute a contempt was also punishable as a substantive crime are not here relevant." 356 U.S. at 173.[12]

[12] Sections 402 and 3691 of Title 18 provide for trial by jury if the alleged disobedience of a court order is "also a criminal offense under any statute of the United States," but actions brought by or on behalf of the United States are excluded.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

THURMAN ARNOLD
ABE KRASH
1229 19th Street, N. W.
Washington 6, D. C.

HAROLD ROSENWALD
85 Devonshire Street
Boston, Massachusetts

Attorneys for Petitioners

Of Counsel:

ARNOLD, FORTAS & PORTER
1229 19th Street, N. W.
Washington 6, D. C.

BURTON L. WILLIAMS
85 Devonshire Street
Boston, Massachusetts

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